Service Date: March 21, 2001

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA
* * * * *

IN THE MATTER OF 3 RIVERS TELEPHONE	)	UTILITY DIVISION
COOPERATIVE, INC., Application for Telephone	)	
EAS between Certain Identified Exchanges and	)	DOCKET NO. D99.7.172
the U S WEST COMMUNICATIONS, INC.,	)	
Great Falls Exchange or Great Falls EAS Region	)	ORDER NO. 6221b

IN THE MATTER OF MID-RIVERS TELEPHONE	)	UTILITY DIVISION
COOPERATIVE, INC., Application for Telephone	)	
EAS between Certain Identified Exchanges and the	)	DOCKET NO. D2000.6.95
U S WEST COMMUNICATIONS, INC., Billings	)	
Exchange or Billings EAS Region	)	ORDER NO. 6328

ORDER ON PSC AUTHORITY TO REQUIRE INTERCOMPANY COMPENSATION IN EAS ARRANGEMENTS

Introduction

1. 3 Rivers Telephone Cooperative, Inc. (3 Rivers), and Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers), have petitioned the Public Service Commission (PSC) for additional telephone extended area service (EAS) with existing Qwest Corporation (Qwest, formerly U S West Communications, Inc.) EAS regions. Mid-Rivers is requesting EAS between its Billings-area Musselshell exchange and Qwest's Billings EAS region. 3-Rivers is requesting EAS between several of its Great Falls-area exchanges (i.e., Belt, Carter, Fairfield, and others) and Qwest's Great Falls EAS region.

2. Mid-Rivers and 3 Rivers and Qwest have submitted a motion and legal arguments (briefs) to the PSC on an issue of whether the PSC has authority to order intercompany compensation in proposed EAS arrangements. Mid-Rivers and 3 Rivers suggest that resolution of the issue by the PSC is important prior to the parties devoting additional resources to develop cost analyses and rate design proposals in further pursuit of the proposed EAS. Mid-Rivers and

3 Rivers argue that the PSC does have authority to order intercompany compensation in EAS arrangements. Qwest argues that the PSC does not have such authority.

Discussion

Preliminary Information

3. Neither Mid-Rivers, 3 Rivers, nor Qwest appear to dispute that there can be intercompany EAS arrangements. These parties also do not appear to dispute that there can be agreed-to intercompany compensation arrangements. Where the legal dispute (or issue) rests is in regard to whether the PSC has authority to order (i.e., compel) intercompany compensation in EAS arrangements when one of the carriers involved objects.

4. If small companies (such as Mid-Rivers and 3 Rivers) or exchanges petitioning for EAS, can spread the cost of EAS among not only their own customers but the customers of a larger petitioned company (such as Qwest) or exchange, then the EAS increment (monthly charge for EAS) per customer becomes relatively small. If small companies cannot spread the cost, the cost of EAS to their own customers could be prohibitive. Previous PSC investigations of EAS in general have indicated that customers of small companies might pay in the neighborhood of $30 per month as an EAS increment if costs cannot be spread among more customers. Qwest customers currently pay $2.44 per month as an EAS increment. A large cost- or price-driver is simply the number of customers the cost can be spread among.

Arguments by the Parties

5. Mid-Rivers and 3 Rivers argue that the PSC has authority to order intercompany compensation in EAS arrangements. These companies argue that PSC EAS rules require the recovery of EAS costs from all customers who directly benefit from an EAS arrangement, Qwest customers will benefit from the requested additional EAS, therefore Qwest customers should contribute to covering the costs. These parties also argue that Qwest supported this position (i.e., costs should be assessed equally to all EAS customers, not just the customers in the exchange to

which the cost applies) during the PSC's mid-1990's efforts to create several Qwest EAS regions and the PSC approved the allocation of costs among all customers when Qwest's EAS regions were approved. Mid-Rivers and 3 Rivers argue that Qwest is estopped (i.e., legally barred) from asserting otherwise, because the legal question existed in the previous PSC proceeding, Qwest was involved in that proceeding, Qwest knew of the issue, Qwest took a position on the issue, and the PSC decided the issue favorable to Qwest. They also argue that there are no PSC rules prohibiting intercompany compensation in EAS arrangements and other types of intercompany compensation arrangements are commonplace in the telecommunications industry. Mid-Rivers and 3 Rivers also argue that the PSC has full authority over Qwest and such full authority extends to requiring Qwest to implement an EAS increment for the benefit of Qwest customers.

6. Qwest argues that the PSC does not have authority to order intercompany compensation in EAS arrangements. Qwest suggests that the PSC cannot look to its rules to decide this matter of PSC authority, rather it is the underlying statutory authority of the PSC that is determinative. Qwest argues that the PSC has no statutory authority to require it to make transfer or subsidy payments to Mid-Rivers or 3-Rivers in intercompany EAS arrangements. Qwest argues that the PSC's regulatory role is to balance the interests of the Qwest investor and the Qwest customer, not to consider requiring Qwest to make payments to other companies the PSC does not even regulate, such as Mid-Rivers and 3 Rivers (cooperatives not regulated by the PSC), all to the detriment of Qwest's customers. Qwest also argues that the PSC is prohibited by § 69-3-806, MCA, from ordering intercompany compensation (at least when an unregulated cooperative is involved), as that statute provides that expenses incurred in conjunction with services that are not regulated may not be attributed to services that are subject to regulation.

Analysis

7. As Mid-Rivers and 3 Rivers point out, one provision of the PSC's EAS rules, ARM 38.5.1315(3), requires EAS rates be designed to "recover the costs of EAS from those customers who directly benefit from EAS" (unless there is a substantial basis for shifting the cost

to others). That rule, along with the remaining PSC EAS rules, ARM 38.5.1305 through 38.5.1315, have yet to be applied in a contested intercompany EAS arrangement. For the most part these EAS rules have only been applied to intracompany EAS, primarily the PSC's 1997 approval of a number of Qwest EAS regions in PSC Docket No. D95.10.146. The exception is a PSC approval (at that same time) of intercompany EAS between Qwest's West Glacier exchange and PTI's (now Citizens) existing Flathead Valley, valley-wide, calling area, but in that matter intercompany compensation was not in issue.

8. The PSC's actions in intracompany EAS arrangements to date (e.g., approval of Qwest EAS regions) have resulted in an allocation of costs among all customers in all exchanges involved. Therefore, Mid-Rivers and 3 Rivers may be correct that the PSC's EAS rules, primarily ARM 38.5.1315(3), have been interpreted so as to justify costs being allocated equally among all customers in all exchanges involved, including for the reason that all EAS customers benefit from EAS in some way. However, in the PSC's order approving the Qwest regions (*PSC Docket No. D95.10.146, Order No. 5889b, February 21, 1997*) the stated reasons for allowing costs to be allocated among all Qwest EAS customers included the existence of a customary practice of statewide rates per company, with no compelling reason presented in the proceeding to depart from that (*Order No. 5889b, para. 30*), and correcting an inequity involving customers within a community of interest being required to pay excessive amounts in toll bills for calls within their community of interest (*id., para 43*).

9. Qwest (then U S West) was supportive of the idea at the time the PSC was processing EAS for the Qwest regions that exist today. However, the PSC does not agree with the Mid-Rivers and 3 Rivers arguments that Qwest is now estopped from taking another position in the present EAS proceedings. The issue is now different factually, primarily because the present EAS involves intercompany compensation. In addition, from all appearances Qwest is not making any argument regarding how ARM 38.5.1315(3) should or should not be interpreted. Qwest is arguing that the PSC simply does not have authority to order intercompany compensation in EAS arrangements when one company objects to that compensation.

10. Qwest argues that administrative agencies (e.g., the PSC) cannot do things the legislature has not authorized and any doubt about an agency's authority should be resolved in favor of no authority. Mid-Rivers and 3 Rivers appear to agree with these things, but argue that the PSC's general powers (*i.e., "full powers of supervision, regulation, and control... ," § 69-3-102, MCA*) provide the necessary authority. The PSC disagrees. The referenced general powers of the PSC are qualified by the provision "subject to the provisions of this chapter."

11. The PSC does not agree that the legislature must specifically identify in detail each and everything an agency is empowered to do. General powers, conditional or not, and powers implied by specific charges or necessary or incidental thereto are enabling legislation. So long as there is a rationale basis for concluding that an agency has been enabled by the legislature to do a certain thing there is no doubt (about existing authority) that needs to be resolved. However, the PSC's concern regarding the present intercompany compensation issue is that there is no qualifying form of legislative authority existing for the PSC to have a rationale basis to order intercompany compensation in EAS arrangements. No statutory authority would be implemented by such order. Other than the PSC general powers statutes, Mid-Rivers and 3 Rivers reference no statute that would tend to give the PSC authority to order intercompany compensation in EAS arrangements. Qwest references one statute, § 69-3-806, MCA, as a prohibition on ordering intercompany compensation in EAS arrangements where an unregulated company is involved. That statute does appear to prohibit regulated services from subsidizing unregulated services, but the PSC is not persuaded that it is necessarily applicable outside the intracompany or company / affiliate situation.

12. Absent a statute upon which the PSC can reasonably rely as authority for ordering intercompany compensation in EAS arrangements, the PSC determines that it does not have statutory authority to take such action. There is no PSC administered statute that allows expressly, by implication, or as a necessary incident thereto, the ordering of intercompany compensation in EAS arrangements.

Done and dated this 27th day of February, 2001, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.